STATE OF NEW YORK
SUPREME COURT COUNTY OF WARREN

PRECISION WALL SYSTEMS, INC.,

Plaintiff,

v.

ARLINGTON EQUIPMENT CORP.,

Defendant.

DECISION AND ORDER

Index No. 60716
RJI No. 56-1-2014-0591

Miller, Mannix, Schachner& Hafner, LLC, Glens Falls (*Leah Everhart* of counsel), for plaintiff.

William J. Nealon, III, Glens Falls, for defendant.

ROBERT J. MULLER, J.S.C.

On or about January 28, 2013, plaintiff – an Indiana corporation – contracted with defendant – a New York corporation – to purchase a mobile glass handler for $49,886.00. Plaintiff then made an initial down payment of $24,943.00 on January 29, 2013. In April 2013, defendant contacted plaintiff to advise that the mobile glass handler was ready for delivery and to request final payment. Plaintiff paid the remaining $29,943.00 within days of this notification. Defendant, however, failed to deliver the machinery. Plaintiff subsequently commenced an action for breach of contract in Indiana and was ultimately granted a default judgment in the amount of $326,290.00, together with interest at 8% per annum from April 7, 2014 onward.[1] Presently before the Court is plaintiff's motion for summary judgment in lieu of

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[1] Plaintiff claimed $49,886.00 in damages for breach of contract and $58,497.00 in consequential damages. Indiana Code 34-24-3-1 provides for an award of treble damages under the circumstances herein and, consequently, plaintiff was awarded $325,149.00 ([$49,886.00 + $58,497.00] x 3), together with $1,000.00 in attorney's fees and $141.00 in filing fees for a total of $326,290.00.

complaint seeking to enforce the judgment in New York and defendant's cross motion seeking to dismiss the action in its entirety.

Turning first to the motion, "under the Constitutional principle of full faith and credit, a judgment rendered by a court of a sister State is accorded the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced" (*Cach, LLC v Boukchouch*, 26 Misc 3d 1211[A], 2009 NY Slip Op 52711[U], *1 [Civ Ct, Queens County] [internal quotation marks and citations omitted]; *see Kemp v Kemp*, 260 AD2d 781, 783-784 [1999]). "'Generally, full faith and credit is accorded sister State judgments where the rendering court had jurisdiction of the parties and of the subject matter, even if the judgment is obtained by default, provided there is no fraud or collusion'" (*Cach, LLC v Boukchouch*, 2009 NY Slip Op 52711[U] at *1, quoting *Overmyer v Eliot Realty*, 83 Misc 2d 694, 704 [Sup Ct, Westchester County 1975] [citations omitted]; *see Parker v Hoefer*, 2 NY2d 612, 616 [1957]). To that end, the court in which enforcement of the default judgment is sought "will ascertain whether the [rendering] court had jurisdiction to enter the judgment" (*All Terrain Properties, Inc. v Hoy*, 265 AD2d 87, 92 [2000]; *see Fiore v Oakwood Plaza Shopping Ctr.*, 78 NY2d 572, 577 [1991]; *Cach, LLC v Boukchouch*, 2009 NY Slip Op 52711[U] at *1). Furthermore, "[a] party against whom a default judgment is entered without obtaining jurisdiction over his person may appear and contest its validity [for instance by seeking to vacate the default judgment] or ignore the judgment and assert its invalidity whenever enforcement is attempted" (*Cach, LLC v Boukchouch*, 2009 NY Slip Op 52711[U] at *1; *see McMullen v Arnone*, 79 AD2d 496, 499 [1981]).

"The proponent of a motion for summary judgment bears the initial burden of showing the absence of material issues of fact; once made, the burden shifts to the opposing party 'to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact'" (*Maines Paper & Food Serv., Inc. v Keystone Assocs.*, 134 AD3d 1340, 1341 [2015], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Phoenix Signal & Elec. Corp. v New York State Thruway Auth.*, 90 AD3d 1394, 1396 [2011]).

Here, plaintiff has submitted a copy of the default judgment issued in Indiana, together with a copy of the affidavit of service of the initial summons and complaint upon defendant. This affidavit of service demonstrates that the pleadings were sent via certified mail to the "Highest Ranking Officer" of defendant at its business address in the Town of Queensbury, Warren County. This manner of service is authorized under Trial Rule 4.6 (A) (1) of the Indiana Rules of Procedure, which provides as follows: "In the case of a domestic or foreign organization, [service may be made] upon an executive officer thereof, or if there is an agent appointed or deemed by law to have been appointed to receive service, then upon such agent" (*see Volunteers of Am. v Premier Auto Acceptance Corp.*, 755 NE2d 656, 660 [Ind. Ct App 2001]; *Northwestern Natl. Ins. Co. v Mapps*, 717 NE2d 947, 953-954 [Ind. Ct App 1999]). Plaintiff has further submitted a copy of Indiana's long arm statute – as set forth in Trial Rule 4.4 of the Indiana Rules of Procedure – which provides that "[a]ny person or organization that is a nonresident of this state . . . submits to the jurisdiction of the courts of this state as to any action arising from [h]aving supplied or contracted to supply . . . goods or materials furnished or to be furnished in this state" (Ind. Rules of Proc., Trial Rule 4.4 [a] [1]). Based upon the foregoing, the Court finds that plaintiff has succeeded in establishing its prima facie entitlement to summary

judgment as a matter of law (*Cach, LLC v Boukchouch*, 2009 NY Slip Op 52711[U] at *2).

In opposition to the motion, defendant contends that service of the initial summons and complaint via certified mail to its highest ranking officer was improper because it had an agent for service of process. This contention is unavailing, however, as Trial Rule 4.6 (A) (1) of the Indiana Rules of Procedures "has been construed as affording a litigant an option in an action against a corporation to serve process upon either an executive officer or agent thereof who has been appointed to receive service" (*Burger Man, Inc. v Jordan Paper Prods., Inc.*, 352 NE2d 821, 835 [Ind. Ct App, 1st Dist 1976]; *see Fidelity Fin. Servs., Inc. v West*, 640 NE2d 394, 400 [Ind. Ct App, 1st Dist 1994]).[2]

Defendant next contends that the State of Indiana improperly exercised its long arm jurisdiction, as defendant "does not supply services to any person, firm, or corporation in the State of Indiana and . . . did not contract to provide goods in the State of Indiana" [Mirel Affidavit, at ¶ 6].

Inasmuch as plaintiff concedes that there was no formal written contract between the parties, the Court "must consider whether the correspondence between the parties constituted an enforceable contract to deliver goods in Indiana" (*Interstate Indus., Inc. v Barclay Indus., Inc.*, 540 F2d 868, 870 [7th Cir 1976]). Under UCC 2-204 (1), "[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."[3] "To form a contract then, it is necessary to show

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[2] Insofar as defendant contends that service was improper under CPLR 311 and 312-a, this contention is misplaced. The inquiry before the Court is whether service was properly effectuated under the law of the State of Indiana.

[3] UCC 2-204 (1) is codified at Indiana Code 26-1-2-204.

agreement or a meeting of the minds" (*Interstate Indus., Inc. v Barclay Indus., Inc.*, 540 F2d at 870).

Here, plaintiff has submitted a copy of the "Invoice" issued to it by defendant on January 28, 2013, which Invoice describes the item sold as a "Mobil Ergonomic Handler" with a total price of "$49,886.00." The invoice further states that plaintiff must pay "50% down with [the] order" and lists the "ship date" as "6-8 weeks." Plaintiff has also submitted a copy of the check whereby it paid the initial $24,943.00 to defendant, as well as the "Order Acknowledgement" [sic] confirming receipt of the payment and indicating that a $24,943.00 balance remained. Finally, plaintiff has submitted a copy of an email from defendant's representative to its representative stating, in pertinent part: "Thank you for your order. We have received your down payment. . . . We will contact you prior to delivery." The Court finds that the foregoing documents constitute an enforceable contract to deliver goods in Indiana. Indeed, defendant's invoice is sufficiently detailed to be characterized as an offer and the subsequent payment by plaintiff constituted an acceptance (*see Oederkerk v Muncie Gear Works*, 179 F2d 821, 824 [7th Cir 1950]; *compare Interstate Indus., Inc. v Barclay Indus., Inc.*, 540 F2d at 873). Defendant has therefore failed to raise an issue of fact as to whether the State of Indiana properly exercised its long arm jurisdiction.

Based upon the foregoing, plaintiff's motion for summary judgment in lieu of complaint is granted. Plaintiff shall submit a proposed Judgment in accordance with this determination within **thirty (30) days** of the date of this Decision and Order.

Defendant's cross motion is necessarily denied.

Therefore, having considered the Affirmation of Cathi L. Radner, Esq. with exhibit

attached thereto, dated October 10, 2014, submitted in support of the motion; Affirmation of William J. Nealon, III, Esq. with exhibit attached thereto, submitted in opposition to the motion and in support of the cross motion; and the Affidavit of Robert Mirel, Esq., sworn to December 9, 2014, submitted in opposition to the motion and in support of the cross motion; Affirmation of Leah Everhart, Esq. with exhibits attached thereto, dated February 10, 2016, submitted in opposition to the cross motion and in further support of the motion; Memorandum of Law of Leah Everhart, Esq., dated February 10, 2016, submitted in opposition to the motion and in further support of the cross motion, and oral argument having been held on February 16, 2016 with Leah Everhart, Esq. appearing on behalf of plaintiff and no appearance on behalf of defendant,[4] it is hereby

ORDERED that plaintiff's motion for summary judgment in lieu of complaint is granted with costs; and it is further

ORDERED that plaintiff shall submit a proposed Judgment in accordance with this determination within **thirty (30) days** of the date of this Decision and Order; and it is further

ORDERED that defendant's cross motion is denied in its entirety.

[4] Inasmuch as the return date of the motion and cross motion was September 11, 2015, plaintiff's February 10, 2016 submissions were exceedingly untimely. With that said, because counsel for defendant failed to appear at oral argument and object to the submissions, the Court nonetheless accepted them. Counsel for plaintiff is hereby directed to refrain from submitting such untimely papers in the future.

The original of this Decision and Order has been filed by the Court together with the Notice of Motion dated October 10, 2014, the Notice of Cross Motion dated December 16, 2014 and the submissions enumerated above. Counsel for plaintiff is hereby directed to promptly obtain a filed copy of the Decision and Order for service with notice of entry upon defendant in accordance with CPLR 5513.

Dated: February 23, 2016
Lake George, New York

ROBERT J. MULLER, J.S.C.

ENTER: